Midtown Service Center, Inc. *and* **James Wayne Wagner.** Case 10-CA-19120

17 August 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 21 October 1983 Administrative Law Judge J. Pargen Robertson issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Midtown Service Center, Inc., Atlanta, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraphs 2(e) and (f).

"(e) Post at its Atlanta, Georgia facility copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

"(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply."

DECISION

STATEMENT OF THE CASE

J. PARGEN ROBERTSON, Administrative Law Judge. This case was heard in Atlanta, Georgia, on August 1 and 8, 1983. The complaint which issued on May 12, 1983, is based on a charge which was filed on March 29 and amended on May 3, 1983. The complaint alleges that Respondent discharged employee James Wayne Wagner on March 25, 1983, in violation of Section 8(a)(1) and (4) of the Act.

On the entire record, and from my observation of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges and Respondent admits that at all material times it is, and has been, a Georgia corporation maintaining an office and place of business in Atlanta, Georgia, where it is engaged in the operation of an automobile service facility and convenience store. The record demonstrated that Respondent is engaged in the retail sale of groceries and related items in its convenience store plus the retail sale of gasoline on consignment from Russell Corporation. Additionally, Respondent performs mechanical repairs to automobiles in its garage.

The General Counsel contends that Respondent's gross sales exceed $500,000 per year. In that regard the parties stipulated (not direct quotes):

(1) That the garage's gross volume for the preceding 12-month period was approximately $122,122 in sales.

(2) That during the preceding 10-month period its convenience store operations (which Respondent started on August 31, 1982) had a gross volume of sales of approximately $189,034.

(3) That the parties expect the gross sales from the convenience store to continue at approximately the same rate shown over the last 10 months.

(4) That Respondent sold gasoline on consignment from Russell Corporation during the preceding 12-month period in the gross amount of $463,880.33. Respondent received a commission for the 12-month sale of gasoline of $15,251.86. During that period Respondent operated under a consignment agreement with Russell Corporation. That consignment agreement provided that ownership of all consigned products, including gasoline, was to pass directly from Russell Corporation to each respective

[1] Chairman Dotson and Member Hunter find it unnecessary to pass on whether the Board's discretionary standard for asserting jurisdiction has been met in this case because the approach to Sec. 8(a)(4) generally has been a liberal one to achieve that section's remedial purposes. The Board has held that, whenever a respondent is alleged to have violated Sec. 8(a)(4) of the Act, jurisdiction may be asserted on a showing sufficient to demonstrate the presence of legal jurisdiction beyond de minimis limits although the Board's discretionary standard may not have been met. *A.A. Electric Co.*, 177 NLRB 504, 507 (1969), enf. denied 435 F.2d 1296 (8th Cir. 1971), revd. 405 U.S. 117, 124 (1972), enfd. on remand 80 LRRM 3055, 68 LC ¶ 12,733 (8th Cir. 1972). See *Pickle Bill's, Inc.*, 224 NLRB 413, 414-415 (1976).

In adopting the judge's finding of a violation here, we find it unnecessary to rely on *Hi-Craft Clothing Co.*, 251 NLRB 1310 (1980), enf. denied 660 F.2d 910 (3d Cir. 1981).

The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the Order to require that the Respondent post the notice to employees immediately upon receipt, and that it notify the Regional Director *in writing* of its compliance efforts.

buyer without passing to Respondent. All sales prices were set by Russell Corporation. Respondent, pursuant to its agreement with Russell Corporation, deposited daily all moneys received from the sale of gasoline and all other products of Russell Corporation. Respondent sold the Russell Corporation products from its convenience store operation and received a commission of 50 percent of the net profit on all Russell Corporation sales.

The General Counsel contends that gross volume should include the 12-month gross from the garage of $122,122, the projected 12-month gross from the convenience store of $226,840.80, and the 12-month gross from gasoline and other Russell Corporation products of $463,880.33. Obviously, if the General Counsel is correct, the above total figure will exceed the Board's retail jurisdiction guideline of $500,000. However, without the gross sales of Russell Corporation products, the $500,000 figure will not be satisfied.

The Board standard for retail establishments requires a gross business volume of $500,000 per year and substantial purchases from, or sales to, other States on a direct or indirect basis. (*Carolina Supplies & Cement Co.*, 122 NLRB 88 (1958); *Dominick's Finer Food*, 156 NLRB 14 (1965), enf. denied on other grounds 368 F.2d 781 (7th Cir. 1966)). In determining gross sales the net profit is irrelevant, regardless of whether the volume is achieved on consignment or otherwise (see *McFarling Bros. Midstate Poultry Co.*, 120 NLRB 1576 (1958)). I find that Respondent's gross volume must include its total received from its garage, convenience store, and gasoline sales. Therefore, its gross volume exceeds $500,000 per year.

As to the question of whether Respondent had substantial purchases from or sales to other States on a direct or indirect basis, the parties stipulated that Respondent made purchases during the immediately preceding 12-month period from the following suppliers whose invoices bear an out-of-the state of Georgia address, even though each supplier also has a local address with local distributors.

Golden Flake Company	$ 935
Warren Candy Company, Inc.	1,522
New England Business Service, Inc.	264
Frito-Lay Company	1,433
Harbor Freight Salvage Company	225

I find that the above evidences substantial purchases from other States on a direct or indirect basis (*Pet Inn's Grooming Shoppe*, 220 NLRB 828 (1975); *Marty Levitt*, 171 NLRB 739 (1978)).

Additionally, the General Counsel argues that, in cases involving Section 8(a)(4) of the Act, it effectuates the policies of the Act to assert jurisdiction even though the Board's discretionary standards have not been met.

As stated in *Clark & Hinojosa*, 247 NLRB 710, 713 (1980):

> [The] Board has held, with judicial concurrence, that whenever a respondent has violated Section 8(a)(4) of the statute appropriately proscriptive and remedial directives may be promulgated—based upon record showings sufficient to demonstrate the presence of legal jurisdiction beyond *de minimis* limits—though relevant discretionary standards may not have been satisfied. *Robert Scrivener, d/b/a AA Electric Co.*, 177 NLRB 504 (1969), aff'd. 405 U.S. 177 (1982), enf'd. on remand 80 LRRM 3055, 68 LC Para. 12, 733 (8th Cir. 1972). See, likewise, *Pickle Bill's, Inc.*, 224 NLRB 413, 414-415 (1976). Compare *Modern Linen & Laundry Service, Inc.*, 110 NLRB 1305 (1955), reversed and remanded *sub nom. Eugen Pedersen v. NLRB*, 234 F.2d 417 (2d Cir. 1956), decision on remand 116 NLRB 1974 (1957), in this connection.

Therefore, I recommend that the Board accept jurisdiction in this matter especially in view of my finding below that Respondent engaged in action violative of Section 8(a)(4) and (1).

II. THE MERITS OF THE ALLEGATIONS

The issues are simple and straightforward. The General Counsel contends that James Wayne Wagner was discharged by Respondent on March 25, 1983, because Wagner threatened to go to the Labor Board because Respondent had discharged a friend of his on the previous Monday. The crux of the General Counsel's case is found in the following testimony of James Wagner:

> Mr. Nix told me that George had told him I had made a statement the previous night that I should go to the Labor Board and see what could be done about another employee's firing that same week. And Mr. Nix told me that—ask me if I had made the statement. I said, "Yes, I did make that statement."
>
> Mr. Nix said, "Well, I'll have to let you go because I can't have anybody working for me that threatens me."

Respondent's president, Thomas Nix, testified as follows regarding the discharge interview which he had with James Wagner on March 25, 1983:

> A. Well, I told him why I was letting him go.
>
> Q. Which was?
>
> A. I had had customer complaints. I had had employee complaints about wanted to work with—not wanting to work with him. And that we had given him every opportunity to straighten up. To keep the place stocked and help keep it clean, and that was the very reason we were firing him.
>
> Q. Right. When did anything about the Labor Board come up?
>
> A. After I had discharged him, he kept on asking for his job back. Give him another chance. And I said I couldn't do it. My decision had already been made, there had been complaints. There had been too many warnings. And I don't remember if he brought the Labor Board up or I did, I really don't. All I know is that I did say, "Here is a phone number to the Labor Board. If you want to call them over Mr. Wooster, because I'm not worried, because he was fired for a legitimate reason."

Q. Okay, did you tell him, as he testified, that he was being fired for threatening to go the Labor Board?

A. No, I did not.

Q. Was he being fired for that reason?

A. No, he was not.

Earlier Nix testified as to the reason he discharged Wagner:

> I fired him for—for being nasty to the customers, being nasty to the employees, and not doing his duties.

III. FINDINGS

During his employment at Respondent from mid-January to March 25, 1983, James Wayne Wagner operated Respondent's convenience store in mid-town Atlanta, between 11 p.m. and 7 a.m. Respondent offered evidence that Wagner's job performance was unsatisfactory which resulted in Wagner's discharge. In that regard Respondent offered evidence that Wagner was rude to customers and that on one occasion he cursed a female taxi driver. Respondent offered testimony that Wagner violated work rules by watching television and failing to keep the convenience store restocked with merchandise. Additionally Respondent contended that Wagner failed to monitor activities on Respondent's premises causing its burglar alarm to go off during the middle of the night.

However, it is apparent, and a fact Respondent's attorney concedes in his brief, that none of the above problems resulted in Wagner's immediate discharge.

It is conceded by Wagner that his attitude toward Respondent's management changed after Respondent discharged Wagner's roommate, Michael Wooster, on March 21, 1983. However, Wagner contended that he performed his duties satisfactorily throughout his employment including the week of March 21 through 25, 1983. Wagner testified that, even though his attitude changed, his behavior did not.

In consideration of the base question (i.e., Respondent's motivation for its discharge of Wagner), I note first that, although President Thomas Nix asserted that he discharged Wagner "for being nasty to customers, being nasty to the employees, and not doing his duties," none of the alleged incidents supporting those allegations were proximate to Wagner's discharge.

It is true that, shortly before his discharge, Wagner did not attend an employee meeting called by Nix after being phoned to attend. However, Wagner was not disciplined because he missed that meeting and Nix did not contend that that action contributed to Wagner's discharge.

As to the other alleged infractions, they did not occur at a time proximate to the actual discharge and Wagner was never disciplined for any of those alleged incidents.

As to the actual motive for Wagner's discharge, both Nix and Wagner testified that the reasons were stated during the March 25 discharge interview. I have determined that Wagner's version of that interview should be credited and Nix's discredited. I base that determination largely on my observation of the demeanor of Wagner and Nix.

Additionally, I found certain statements by Nix regarding the interview to be incredible. Nix contended that he was not upset or concerned with whether Wagner went to the Labor Board. Nevertheless, Nix admitted that he told Wagner, during the discharge interview, that Nix had been told that Wagner "was going to the Labor Board because of his roommate having been discharged."

Nix admitted that employees George Bradon, Diane Hampton, and Mary Surber told him that Wagner threatened to go to the Labor Board. Nix was asked by the General Counsel if he was told that on the morning of March 25 and Nix replied that was not true, that he was told of Wagner's threat around "the 22nd, 23rd."

However, Nix's testimony was in direct conflict with that of another of Respondent's witnesses, Assistant Manager Diane Hampton. Hampton testified that it was her recollection that James Wagner told her on the night before his discharge that he was upset and was going to the Labor Board over his roommate's discharge. Hampton testified that she told Nix about Wagner's threat the next morning (March 25). I was impressed by Hampton's demeanor. She appeared to testify truthfully. I am convinced and find that her testimony is correct. None of Respondent's other witnesses supported Nix's testimony that he learned of Wagner's threat to go to the Labor Board on March 22 or 23. Therefore, I discredit that testimony.

Additionally, Nix's version of his terminal interview with Wagner appears incredible on its face. Nix testified that after he discharged Wagner, Wagner kept asking for his job back. Then, according to Nix, he told Wagner, "Here is a phone number to the Labor Board. If you want to call them over Mr. Wooster, because I'm not worried." Nix does not explain why Wooster's discharge came up in the context of Wagner repeatedly asking for his own job. I am convinced that Nix's version is illogical. It does not seem reasonable that Wagner would turn his plea to another's discharge in the context of asking for his own job.

In view of the above and on the entire record, I find that Thomas Nix discharged James Wagner immediately on Wagner reporting for work on March 25, the day Nix learned that Wagner had threatened to go to the Labor Board. Further, I find that Nix told Wagner that he was being discharged because of his threat to go to the Labor Board.

The record shows that the grounds asserted by Respondent for Wagner's discharge were pretextual. The record illustrates that Wagner would not have been discharged on those grounds. Wagner would not have been discharged absent his comment that he was going to the Labor Board over his roommate's discharge by Respondent.

The Board has continually held that Section 8(a)(4) of the Act extends the Act's protection to employees because they threaten to seek the Labor Board's assistance. *Overseas Motors*, 260 NLRB 810 (1982); *Hi-Craft Clothing*

Co., 251 NLRB 1310 (1980), enf. denied 660 F.2d 910 (3d Cir. 1981); *Borden, Inc.*, 248 NLRB 1228 (1980).

Therefore, I find that James Wayne Wagner was discharged by Respondent in violation of Section 8(a)(1) and (4) of the Act.

CONCLUSIONS OF LAW

1. Midtown Service Center, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By discharging its employee James Wayne Wagner on March 25, 1983, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (4) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. As I have found that Respondent unlawfully terminated employee James Wayne Wagner, I shall recommend that Respondent be ordered to offer Wagner immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges. I shall further recommend that Respondent be ordered to make Wagner whole for any loss of earnings he may have suffered as a result of the discrimination against him. Backpay shall be computed with interest as described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[1]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Midtown Service Center, Inc., Atlanta, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging and thereafter refusing to reinstate its employees because they state they will go to the National Labor Relations Board.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act.

(a) Offer immediate and full reinstatement to James Wayne Wagner to his former position or, if that position, no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges.

(b) Make James Wayne Wagner whole for any loss of pay he may have suffered as a result of the discrimination against him in the manner set forth in the section of this decision entitled "The Remedy."

(c) Expunge from his file any reference to the termination of James Wayne Wagner and notify Wagner in writing that this has been done and that the evidence of his unlawful termination will not be used as a basis for future personnel action against him.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Atlanta, Georgia facility copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 10 after being signed by Respondent's authorized representative, shall be posted for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[1] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or refuse to reinstate our employees because they state they will go to the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer immediate and full reinstatement to James Wayne Wagner to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges.

WE WILL make James Wayne Wagner whole for any loss of earnings he may have suffered by reason of our discrimination against him with interest.

WE WILL expunge from our records any reference to the termination of James Wayne Wagner and WE WILL notify him in writing of our action in that regard.

MIDTOWN SERVICE CENTER, INC.